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Long-Term Care Liability Insurance

A MARKET AT A CROSSROADS

WHITE PAPER

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Long-Term Care Liability Insurance: A Market at a Crossroads

We're a long way from the year 2000, when a report from IRMI characterized the market for professional liability insurance for long-term care (LTC) facilities as "abysmal."

Rocked by well-publicized reports of nursing home abuse, and by large jury awards in negligence cases, the market for coverage hardened dramatically in the early 2000s. This prompted a study by AARP, which reported in 2003:

"In recent years, nursing homes in some states have experienced dramatic increases in the cost of liability insurance. In addition, many insurers have stopped offering policies altogether in some states, making coverage difficult to obtain."[1]

Fast forward to 2018, and Worldwide Facilities detects potential for a new hardening of the market, after years of abundant capacity.

Numerous carriers have entered and left the market since the crisis of the early 2000s, and the survivors are starting to show more selectivity in pricing and coverage. Many carriers have restricted coverage options in difficult jurisdictions, and some have opted out of specific venues altogether until they are more comfortable with regulatory and legal environments.

Nonetheless, at the moment, plenty of capacity is still in place for long-term care liability insurance. Worldwide Facilities believes long-term care presents a good opportunity for brokers to grow a book of business in a rapidly expanding space—and to make a real difference in the lives of those who care for our elderly and infirm.

Losses Mounting

The frequency of LTC liability claims is increasing at a rate of 2% annually, while the severity of losses is increasing by 4% annually, according to the latest addition of Aon's annual benchmarking study on LTC liability claims.[2]

The Aon report also projects that the 2018 "loss rate" for LTC liability—the amount needed to defend and pay GL and professional liability claims—will amount to $2,450 per occupied bed. That figure compares with $1,940 per bed in 2014 and is projected to increase 6% a year.

As for the causes of claims, CNA reports that injuries resulting from falls constitute by far the most common cause of liability claims in its book of LTC business.[3]

"Resident falls" account for 42.7% of closed liability claims against CNA-insured LTC facilities, with "failure to monitor" alleged in half the cases. Death of the injured resident results from half of all reported falls and 52.7% of all reported injuries.

Bedsores, technically labeled "pressure ulcers," are the second biggest source of claims (18.6%), followed by improper care (14.7%). Together, falls, bedsores, and improper care amount to three-quarters of the closed claims reported by CNA. Elopement, the act of a patient wandering off, occurs rarely, accounting for only 1.8% of CNA's closed claims. Elopement leads the list in severity, however, amounting to $325,561 per average total closed claim payment.

Facilities Improving

Generally speaking, there is evidence to suggest the overall quality of LTC facilities is improving, especially since implementation of the "Five-Star" nursing home quality rating system by the Centers for Medicare and Medicaid Services (CMS).

Under the system, first implemented in December 2008, nursing homes are assigned from one star (the lowest rating) to five stars (the highest) for state

inspection findings, staffing levels, and "quality measures" derived from data reported to CMS, plus an overall quality rating.

The ratings are posted on CMS's "Nursing Home Compare" website to assist users in identifying and comparing LTC providers.

Over the first five years of the program, the percentage of facilities earning a designation of five stars for overall quality more than doubled, from 11.8% in January 2009 to 24.1% in October 2013, according to the most recent report prepared for CMS by the research firm Abt & Associates.[4]

Over the same period, the percentage of facilities with only one- or two-star ratings fell from 42.5% to 26.9%.

The five-star system is not designed to be a system for monitoring liability, and the authors of the Abt report caution that "it is possible that these changes reflect changes in reporting practices rather than real changes in quality."

Yet, to the extent that the improved ratings reflect quality of care or better reporting—or both—the trend is a good one for LTC liability insurers.

Federal Turnabout

The five-star rating system was born in the waning days of the administration of President George W. Bush and enforced and revised during the terms of President Barack Obama.

The Obama Administration was active in introducing or strengthening federal regulations on nursing homes, but the succeeding administration of President Donald Trump has proceeded to stall or reverse many Obama-era initiatives.

In June 2017, CMS won applause from the American Health Care Association (AHCA, the leading trade association of LTC facilities) for its proposal to eliminate

a 2016 prohibition on the practice of requiring residents to sign statements committing themselves to accept binding arbitration of any disputes with the care provider.

In its place, the revised rule would still allow facilities to have residents commit to binding arbitration (and forfeit their right to sue for damages), but such agreements must be in plain language and explained to the resident, and they cannot prohibit or discourage LTC residents from communicating with public authorities.

The Trump Administration followed up in July by announcing it would delay enforcement of provisions of the 2016 CMS "MegaRule," which specified procedures for monitoring and reporting on details of an LTC resident's plan of care. Then, in November, CMS announced it was scaling back the imposition of fines on nursing homes for violations of standards cited by federal inspectors.

It's hard to know how CMS's more relaxed approach to regulation will affect the level of risk at individual facilities, but repeal of the prohibition on binding arbitration agreements is an unalloyed boon to anyone seeking to reduce exposure to liability loss.

That said, any measure to stabilize liability losses is a double-edged sword for those competing to insure long-term care facilities, or just about anything else. The more stable and less volatile the loss experience in a market, the more tempting it is for new competitors deploying "naïve" capital.

Disaster Concerns

This report does not address first-party property loss, but the natural disasters of 2017 dramatically demonstrated the level of liability exposure a nursing home can incur as the result of a property event.

In the wake of the deaths of 14 Florida nursing home residents after their facility lost power and air conditioning during Hurricane Irma, LTC facilities in that state are now required to have backup generators and enough fuel on hand to maintain indoor temperatures at 81˚F or cooler for four days.

This requirement was implemented as researchers at the University of South Florida released a study indicating that nursing home residents who were evacuated in advance of a natural disaster had a higher risk of dying than if they were able to stay in their facilities.

“Moving elderly patients certainly adds another exposure,” says Jordan Connelly, Senior Vice President at Worldwide Facilities. “for patients that require extra care, the evacuation is not only disruptive to their care but it can be traumatic. If it must be done, patients should be moved in a timely and organized fashion.

“In that case, coverage for evacuation expenses is also a key insurance consideration for LTC facilities, which can face hefty bills if they are forced to move patients, their belongings, and healthcare equipment in a hurry.”

Range of Relevant Risks

In recent decades we’ve seen a rapid expansion in the breadth and variety of facilities offering element of long-term care. Brokers are well-advised to understand the distinctions among them, but not to make any assumptions about a risk simply by its label.

According to CNA’s latest annual report on causes of loss in its LTC portfolio, skilled-nursing facilities, which treat frail and vulnerable populations, accounted for more than 80% of CNA’s closed claims, even though they accounted for fewer than half the beds in insured facilities.[5]

Assisted living facilities accounted for 16.4% of closed claims, but had a slightly higher loss severity, $221,496, compared to $212,766 for skilled nursing facilities. Independent living facilities accounted for 2.8% of closed claims.

As for the ownership and operation of a facility, CNA found that for-profit facilities had a disproportionately higher frequency of closed claims and greater loss severity than their non-profit counterparts.

- **Independent living facilities:** Generally for adults capable of caring and providing for themselves, but who choose to live in communities which may provide access to some specialized services, but usually not medical care.

- **Assisted living facilities:** Generally for adults capable of living on their own but with a need for some oversight and occasional or specialized assistance with aspects of living (meals, transportation, etc.); some basic health care is often included.

- **Day care and temporary care facilities:** Generally for adults capable of living in their homes with family support, but who need monitoring and care when family members are not available.

- **Nursing homes:** Generally for adults who need specialized medical care and professional monitoring around the clock. Nursing homes are further categorized as:

    - **Intermediate care facilities**, which provide limited medical care, such as administering prescribed medications and aiding with moderate rehabilitation exercises.
    - **Skilled nursing facilities**, which have clinical staff authorized to provide a higher level of medical care, such as injections, social services, and physical, occupational and speech therapy.
    - **Sub-acute facilities**, which have clinical staff authorized to provide higher levels of medical care, such as post-operative rehabilitation services.

- **Hospice and palliative care facilities:** Generally for adults suffering from a terminal condition that cannot be treated; provides specialized care for relief of suffering.

- **Continuous care facilities:** Facilities that offer one or more of the living environments and specialized services listed above.

Choosing an LTC Liability Program

Long-term care liability forms offered by various carriers included standardized components, but customization is common, and brokers need to be ready to work with each client on a case-by-case basis to select the coverage most appropriate for them.

Any broker looking to achieve success in LTC liability insurance needs to understand key exposures and the coverage options for addressing them. Flexibility and the ability to develop and deliver customized products are important when working to address the specific needs of the client.

Here are some of the key considerations for creating an LTC liability policy:

Main coverage parts

- General Liability
  - Occurrence-based
  - Defense outside limits
- Professional Liability
  - Can be occurrence-based or claims-made coverage
  - Can cover defense costs within or outside policy limits
  - Settlements typically subject to insured’s approval with “hammer clauses” that make insured liable for a percentage of defense costs and damages above those for a rejected settlement
- Hired, non-owned auto coverage

Additional coverage concerns

- Sexual Abuse Coverage
  - Can be available up to full GL or professional liability limits
  - May be provided under a sexual abuse sublimit, often $1 million
- Punitive damages coverage
- Employee benefits liability
- Employment practices liability

- Resident evacuation expenses
- Disinfection event expenses
- Crisis communications / PR expense
- “Cyber” options for network security and privacy protection

Rely on Worldwide Facilities

Your current wholesaler partner may lack the expertise needed to guide you in tailoring coverage for long-term healthcare risks. At Worldwide Facilities, we’ve been placing healthcare insurance since 1970. Our expertise in long-term care and other healthcare coverages is unparalleled.

Worldwide Facilities, LLC is a national wholesale broker and managing general agent providing services to insurance agents and brokers. In business since 1970, our seasoned team of brokers and underwriters offers specialized knowledge of construction exposures, broad access to specialty markets, and extensive expertise in placing challenging insurance risks.

We offer unmatched tools, resources, and strategies to help insurance agents and brokers expand their corporate accounts to include long-term care and other healthcare challenges.

Take advantage of our expertise in placing long-term care liability risks today—contact Jordan Connelly in our Atlanta office at (678) 502-1260 or jconnelly@wwfi.com to schedule a conversation.

Notes

[1] Bernadette Wright, Ph.D., *Nursing Home Liability Insurance: An Overview*, AARP Public Policy Institute, July 2003.
[2] Aon Risk Solutions, 2017 *Long Term Care General Liability and Professional Liability Actuarial Analysis*, November 2017. The findings reflect only those claims that amounted to $1 million or less in losses..
[3] CNA Insurance, *Aging Services 2016 Claim Report*.
[4] Abt & Associates, *Nursing Home Compare Five-Star Quality Rating System: Year Five Report*, June 16, 2014.
[5] CNA Insurance, *Aging Services 2016 Claim Report*.

Disclaimer

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